BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCIS DURHAM	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S.D. 376	)	
Respondent	)	Docket No. 1,054,127
	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY CO. and EMCASCO INSURANCE CO.[1]	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 13, 2011, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was entitled to medical care and ordered respondent to provide claimant with a list of three physicians from which claimant could designate an authorized treating physician. The ALJ further ordered respondent to pay claimant's medical expenses incurred to date as authorized medical. However, the ALJ found claimant failed to establish that he was temporarily totally disabled.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 11, 2011, Preliminary Hearing and the exhibits and the transcript of the May 13, 2011, Preliminary Hearing, together with the pleadings contained in the administrative file.

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[1] At the March 11, 2011, preliminary hearing, respondent's attorney said that Employers Mutual Casualty Company is the insurance carrier on both dates of accident. Employers Mutual Casualty Company and Emcasco Insurance Company are related entities.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered personal injuries in a series of repetitive traumas. Respondent further contends in the event the Board finds claimant suffered personal injury by a series of repetitive traumas that arose out of and in the course of his employment, claimant failed to provide respondent with timely notice of said accidents.

Claimant has not filed a brief in this appeal.

The issues for the Board's review are:

(1) Did claimant suffer personal injuries in a series of repetitive traumas that arose out of and in the course of his employment with respondent?

(2) If so, did claimant provide respondent with timely notice of accident?

FINDINGS OF FACT

Claimant has worked for respondent for almost 8 years full time as a custodian. On January 13, 2011, he filed an Application for Hearing claiming an injury on "09/24/07, and August 2010 and each and every working day." He claimed injuries to his collarbone, sternum, chest and all parts affected after he "[c]aught [a] 5 gallon bucket full of sand as it fell off back of truck, and repetitive use."

A preliminary hearing was held on March 11, 2011, at which time claimant testified that he was injured on September 18, 2007,[2] while lifting five gallon buckets of paint out of a semi while working at the school. One bucket slipped off the truck, and he caught it. He then felt a pop in his chest in the right clavicle area. He felt a sharp pain in his chest area going out toward his shoulder on the right. He continued working that day, but he reported the injury to the school's head custodian. The head custodian told him to see a doctor, and claimant went to his personal physician, Dr. Alan Davidson, on September 24, 2007.

Dr. Davidson's medical record of claimant's September 24, 2007, visit indicates claimant complained of left clavicle pain and said he had been doing some "heavy lifting and stuff with working out at the pig farm."[3] The words "pig farm" were crossed out and the

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[2] On March 15, 2011, claimant filed an Amended Application for Hearing with the Division correcting the September 24, 2007, date to September 18, 2007.

[3] P.H. Trans. (March 11, 2011), Cl. Ex. 1 at 5. Claimant testified that when he returned to Dr. Davidson in December 2010, he realized the medical records of September 24, 2007, indicated he had injured his left clavicle rather than the right clavicle. He testified that his complaints were in his right clavicle but the x-ray was mistakenly taken of his left clavicle.

words "at school" were inserted in their place. This change was initialed and dated December 6, 2010. Dr. Davidson's medical report also indicated that claimant "noticed some irritation even with some work at the school district."[4] An x-ray report of claimant's left clavicle dated September 24, 2007, ordered by Dr. Davidson, showed no evidence of fracture or other acute bony abnormality of the clavicle. Claimant testified he had no idea why Dr. Davidson's note originally indicated he was injured working at the pig farm and also said he had never made a claim against the pig farm for injuries.

Claimant was given a cortisone injection, which he said helped about a month, and was given light duty restrictions for one month. Claimant started taking Ibuprofen all the time, because Dr. Davidson had told him he would probably always have trouble with his symptoms. Claimant testified that after his cortisone treatment wore off, he did not have constant pain, but the pain would come and go. He did not return to Dr. Davidson or any other physician about either his right or left clavicle pain until December 2010.

Claimant said in 2008[5] he received a bill from Dr. Davidson for the September 24, 2007, treatment. He called Dr. Davidson about the bill, and Dr. Davidson told him the bill should be paid under workers compensation and said he would send the bill to the district office. Claimant heard nothing again about the bill, except that later Dr. Davidson told him the school district had paid the bill. He did not receive any more treatment for his right clavicle pain from the September 2007 accident.

Claimant testified that in August 2010, the school got new lunch room tables. Because the lunch room is in the gym area, each day the tables need to be collapsed and moved to the side of the room. The new tables were longer and harder to set up than the old lunch room tables. After working with the new tables, claimant testified he started having more pain in his chest, "like a stretching in the clavicle area and out to my shoulder on the right side."[6] He said the pain would keep him up longer at night. In December 2010, claimant asked Julie Gellerman, a secretary at respondent, to be sent to a doctor, but she told him his injury had occurred at a hog barn so he would have to see his personal physician. Claimant admitted that he had a part time job at a hog farm in 2007 but insisted he injured his clavicle at the school.

After being told to see his personal physician, claimant went back to Dr. Davidson on December 8, 2010, where he complained of right clavicle pain which he said had been ongoing since the injury of September 18, 2007, but had become more intense over the

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[4] P.H. Trans. (March 11, 2011), Cl. Ex. 1 at 5.

[5] Dr. Davidson's medical records indicate claimant called him about the bill on January 23, 2008.

[6] P.H. Trans. (March 11, 2011) at 21.

last couple of months.[7] Although there is no mention of it in the medical records, claimant testified he told Dr. Davidson about the tables at school. Dr. Davidson ordered an x-ray of claimant's sternum, which showed no fracture or abnormality of the sternum. He then referred claimant to Dr. Jonathan Loewen for an orthopedic consultation. Dr. Davidson also gave claimant a 20-pound lifting restriction, which claimant took to school and showed to Principal Bill Anderson. Claimant's last day worked was on December 9. On December 10, 2010, respondent placed claimant on medical leave.

In filling out the patient questionnaire for Dr. Loewen's office, claimant indicated that his injury occurred when he was lifting a five-gallon bucket of paint. He described his usual work activities as lifting, putting tables up and down, and lifting trash. Claimant saw a physician's assistant at Dr. Loewen's office on December 27, 2010. He complained of bilateral clavicle pain. He reported the accident of September 2007 that injured his right sternoclavicular area. Claimant told the physician assistant that he had pain ever since September 2007 and has now developed pain in his left sternoclavicular joint. He claimed he had pain at nighttime and if he did any lifting. Claimant was sent for a CT scan, which was performed on December 29, 2010, and it showed no evidence of acute fracture or sternoclavicular dislocation.

Claimant visited with Dr. Loewen on January 10, 2011. He testified he told Dr. Loewen about his work activities and increase in symptoms. Dr. Loewen did not recommend surgery and referred claimant to Dr. Kevin Brown. Dr. Brown's records indicate he initially saw claimant on February 22, 2011, at which time claimant complained of right chest pain with an onset of September 18, 2007, when he was lifting a bucket of paint. Dr. Brown referred claimant to physical therapy. The physical therapy records indicate an onset of September 18, 2007, and that claimant's condition is not work related. None of Dr. Brown's records, including the physical therapy notes, indicate that claimant injured either shoulder or clavicle area while working at respondent.

At the March 11, 2011, preliminary hearing, claimant testified that he had been examined by Dr. Murati a few weeks earlier[8] and that during the examination, Dr. Murati moved his arm back and forth and caused him to become sore. Dr. Murati's report was not offered as an exhibit at the March 11, 2011, preliminary hearing.

Julie Gellerman testified that she is the clerk of the Board at respondent and basically does all the paperwork. She is involved in workers compensation matters. Ms. Gellerman said that back in 2007, claimant reported to her a problem with his clavicle after he handled a bucket of paint. She was aware claimant sought medical treatment with Dr. Davidson. She was aware that a workers compensation claim was started. However, later

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[7] The office note of December 8, 2010, clarifies the 2007 injury was to the right clavicle and the x-ray was of the bilateral clavicles.

[8] Claimant could not remember the exact date he saw Dr. Murati.

respondent received a letter indicating that the claim had been denied. She heard nothing further about the 2007 claim.

In December 2010, claimant spoke with Ms. Gellerman about his clavicle problem. He told her his collarbone injury was hurting again and he wanted to go back to the doctor. He referenced his pain to the incident in September 2007. He did not tell her that he had suffered any new injuries or sustained any new accidents. He did not mention anything about lifting tables at work. Ms. Gellerman said the first she knew that claimant was claiming an injury from lifting tables was March 11, 2011, at the preliminary hearing.

Ms. Gellerman pulled claimant's previous file from 2007 and found the information that said his claim had been denied. She called claimant back and told him the claim was denied. She called respondent's insurance carrier and was told that the statute of limitations had run for any further claims or for reopening the claim on claimant's September 2007 injury. She then called claimant again and told him the statute of limitations had run. She also advised Dr. Davidson's office that claimant's treatment would not be authorized under workers compensation.

Ms. Gellerman said claimant had not asked for medical treatment for his clavicle problem from September 24, 2007, until December 2010. When claimant came to her in December 2010, he stated his old injury was bothering him and he wanted it looked at again. She did not ask him whether he had suffered a new injury or if any of his activities had changed.

Frederick Dierkson is the superintendent of schools for respondent. Mr. Dierkson remembered the paint bucket incident that had occurred in 2007. He testified he had no discussion with claimant about any physical problems claimant was having in December 2010. At some point, he ran into claimant when claimant brought in a second work restriction slip to the school. He asked claimant why he was not working, and claimant told him the problem went back to the injury in 2007. Claimant did not tell Mr. Dierkson that he had suffered any new injuries. Mr. Dierkson said the first time he was aware claimant was contending he injured himself lifting tables was at the March 11, 2011, preliminary hearing.

Mark Britton is a maintenance supervisor for respondent and was claimant's supervisor in 2007 through November 2010. During that period, he communicated with claimant on a regular basis, but not every day. Mr. Britton testified that claimant never told him he had been injured lifting lunch tables. Claimant never complained to Mr. Britton about the change in the lunch tables. Mr. Britton said the old lunch tables needed to be moved also, but the new lunch tables were larger.

On March 14, 2011, the ALJ issued his preliminary hearing Order, in which he stated:

> Claimant's preliminary hearing requests are considered and denied. As to a claimed series of accidents, Claimant has failed to sustain his burden of proof of

> personal injury by accident arising out of and in the course of his employment with Respondent.
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> As to the claimed September 18, 2007 injury, Claimant's preliminary hearing requests are considered and denied, as Claimant failed to file a timely Application for Hearing within two years of the last payment of compensation, or three years of the date of accident, as required by K.S.A. 44-534(b).[9]

The ALJ's Order of March 14, 2011, was not appealed to the Board. Instead, claimant filed an Application for Preliminary Hearing on March 31, 2011, which was scheduled for hearing on May 13, 2011. There was no testimony taken at the May 13 hearing. Claimant's attorney entered as an exhibit a letter from Dr. Alan Davidson to claimant's attorney dated April 5, 2011, in which he stated:

> When [claimant] was seen on December 8, 2010, he described increased pain in his shoulder for the last couple of months. This has been ongoing in a chronic way since September 24, 2007. The patient stated in conversation that it bothered him more with lifting lunch room tables, which started to intensify the pain. This was also documented in the notes of his orthopedic evaluation.[10]

Claimant's attorney attempted to enter into evidence a report from Dr. Pedro Murati. However, respondent's counsel objected based on claimant's failure to provide him with a copy of Dr. Murati's report within 15 days pursuant to K.S.A. 44-515. The ALJ sustained the objection of respondent's counsel, and the report was not entered. That ruling has not been appealed to the Board.

The arguments at the May 13, 2011, preliminary hearing concerned only claimant's claim of a repetitive injury from August 2010 to December 10, 2010. Claimant's attorney argued that Dr. Davidson's letter "provides support with medical evidence that this claimant did report to the physician an increase in pain and symptoms with the new activity of setting these lunch tables and tearing them down every single day beginning in the school year of 2010."[11] Respondent's attorney argued that Dr. Davidson's records were unreliable as the records originally had the wrong history (pig farm rather than school) and the wrong body part (left rather than right clavicle). And, therefore, respondent contends Dr. Davidson's April 5, 2011, letter is also unreliable.

At the May 13 hearing, the ALJ ruled:

> . . . I believed [claimant] when he said that his problems recurred with the new dining room tables and that was supported by Mark Britton, the maintenance supervisor. The tables had been replaced and they were larger than the old tables

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[9] ALJ Order (March 14, 2011).

[10] P.H. Trans. (May 13, 2011), Cl. Ex. 2.

[11] P.H. Trans. (May 13, 2011) at 13.

> and heavier and harder to move. I just didn't have any medical evidence at that time that he had indeed aggravated, accelerated or intensified his earlier work injury. It makes sense that it did.
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> . . . .
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> . . . I'm going to . . . find the claimant has sustained his burden of proof of a repetitive use aggravation of his 2007 injury . . . .[12]

The ALJ also found that claimant's notice of injury was timely.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[13] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[14]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[15]

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[12] P.H. Trans. (May 13, 2011) at 24-25.

[13] K.S.A. 2010 Supp. 44-501(a).

[14] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[15] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[16] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[17] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[18]

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that

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[16] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[17] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[18] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[20]

ANALYSIS

When claimant filed his Application for Hearing on January 13, 2011, he was out of time to pursue a claim for an accident occurring in September 2007.[21] However, he was not out of time for filing a written claim for compensation for a series of accidents through his last day worked. Respondent disputes that claimant suffered any accident or series of accidents after September 2007 and further disputes receiving timely notice of any such accident.

Claimant testified that in September 2007, he injured his chest area and out towards his right shoulder and clavicle lifting paint buckets. He contends that his symptoms never fully resolved, and beginning in August 2010, claimant aggravated his prior injury and began to experience new symptoms in his chest near his sternum and out towards both shoulders. Claimant related these symptoms to his job duties with respondent, in particular lifting and moving the new, heavier tables in the school lunchroom. The ALJ determined claimant was a credible witness and, based upon his testimony and the April 5, 2011, report of Dr. Davidson, claimant had met his burden of proving a new series of work-related accidents through December 9, 2010, his last day worked. Because respondent did not provide an authorized physician, pursuant to K.S.A. 2010 Supp. 44-508(d) the date of accident for the series is "the date upon which the employee gives written notice to the employer of the injury." As the first written notice was the Form E-1 Application for Hearing, notice was timely.

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[19] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[20] K.S.A. 2010 Supp. 44-555c(k).

[21] K.S.A. 44-520a and K.S.A. 44-534(b).

CONCLUSION

(1) Claimant suffered personal injuries in a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant provided timely notice of his series of accidents.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 13, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge